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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1315

COLORADO PUMP & SUPPLY COMPANY,
a Colorado corporation,
Petitioner,

VERSUS

FEBCO, INCORPORATED, a corporation; and THOMPSON PIPE & STEEL COMPANY, a corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

QUIAT AND QUIAT, P.C.
By JAMES C. BULL
1045 First National Bank Building
Denver, Colorado 80202
Counsel for Petitioner

March, 1973

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. ———

COLORADO PUMP & SUPPLY COMPANY,
a Colorado corporation,
Petitioner,

VERSUS

FEBCO, INCORPORATED, a corporation; and THOMPSON PIPE & STEEL COMPANY, a corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on January 5, 1973, and the Order of Court denying rehearing entered on February 7, 1973.

CITATIONS TO OPINIONS BELOW

The Order of the United States District Court for the District of Colorado together with the Court's findings of fact and conclusions of law is not reported and is printed in Appendix B hereto.

The Opinion of the Tenth Circuit Court of Appeals which affirmed the judgment of the District Court together with the dissent thereto is not reported at this time and is printed in Appendix A hereto.

JURISDICTION

The Opinion and Judgment of the Court of Appeals was entered on the 5th day of January, 1973. Petition for Rehearing was denied on the 7th day of February, 1973. An Order recalling the mandate and staying the same until March 29, 1973, was entered on February 26, 1973.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1254 (1).

QUESTION PRESENTED

Does a contractual provision in a sales contract between manufacturer and dealer which authorizes a dealer to sell products in a specified area where title to those products has passed from manufacturer to the dealer violate the Sherman Anti-Trust Act when no evidence is produced showing the dealer sells those products outside the specified area?

FEDERAL STATUTES INVOLVED OR APPLICABLE

The following statutes shall be set forth in Appendix D:

15 U.S.C. Sec. 1—Restraints of Trade

15 U.S.C. Sec. 2—Monopolizing Trade

15 U.S.C. Sec. 15—Suits by Persons Injured

STATEMENT OF CASE

The within action arose out of a filing pursuant to alleged violations of the Respondents of the Sherman Anti-Trust Act (15 U.S.C. 1, 2 and 15). The Petitioner (a former dealer) asserted in District Court that Febco (the manufacturer) had refused to continue to deal with the Petitioner because of the execution by Febco and Thompson Pipe & Steel Co. (a dealer) of what Petitioner argued was an illegal contract in restraint of trade. Further, Petitioner said the dealer (Thompson) was selling to Petitioner's customers at retail while receiving a discriminatory price advantage, *i.e.*, it was admitted the dealer (Thompson) received a 50/10 per cent discount on Febco packaged items while Petitioner only received a 40 per cent discount. (Petitioner had received a 50/10 per cent discount prior to the execution of the subject contract. Subsequent to the execution thereof Petitioner had to purchase Febco products from Thompson and received the 40 per cent discount.) Both Thompson (the dealer) and the Petitioner (the former dealer) competed for the same retail customers and for the same wholesale customers both before and after the subject contract was executed. Petitioner asserted the price discrimination was evidence of a monopolistic attempt and intent on Thompson's part and that if the contract was illegal, Febco had to sell Petitioner on the same basis as Febco sold Thompson.

The Respondents asserted Thompson was simply appointed an exclusive dealer and there was a unilateral refusal to deal with the Petitioner by the manufacturer. The contract between Febco and Thompson stipulated:

"2. Territory: This authorizes Distributor to sell within the following territory: Colorado, Wyoming, Nebraska, from county lines running North and South lying East of U.S. Hwy 83 and Western Kansas from county lines running North and South lying East of U.S. Hwy 283." (See Appendix E for entire contract.)

Additional contractual obligations of Febco were tied to the foregoing "territory."

No evidence was presented showing that Febco had ever tried to sell or had sold outside of its "territory." The subject contract contained no "exclusive franchise" language.

Evidence was presented showing a dramatic increase in Thompson's sales and dramatic decreases in the Petitioner's sales of Febco products.

The District Court bifurcated the trial not taking evidence regarding damages and ruled in its findings and conclusions on liability only. The District Court determined no violations had been shown and dismissed the complaint. (See Appendix B.)

The court had earlier dismissed claims against James R. Coson, Buckner Industries, Ind., and Buckner Sprinkler Co. for lack of personal jurisdiction. No error was attributed to such dismissals.

The Tenth Circuit Court by a split vote (Judge Murrah dissenting) affirmed the District Court stating that vertical restrictions as to territory after title has passed must be "firmly and resolutely" enforced before a violation of the Sherman Act occurs. (See Appendix A.) Also the Tenth Circuit could find no Robinson-Patman violation in

the price disparity admitted by Thompson and Febco but only a lawful "refusal to deal."

Judge Murrah's dissent agreed with the Petitioner that the Febco-Thompson contract was in violation of the Sherman Act and illegal pursuant to the Rule laid down by this Court in *United States* v. *Arnold, Schwinn and Co.*, 388 U.S. 363, 87 S.Ct. 1856 (1967).

Judge Murrah said of the majority opinion, "I do not believe that the legality of a contract such as this one should be made to turn on whether the contractual restrictions are 'firmly and resolutely' enforced. Otherwise, *Schwinn* is a shambles." (See Appendix A.)

A motion for rehearing was filed and by split vote, denied on February 7, 1973. Judge Murrah voted to rehear the case.

REASONS FOR GRANTING THE WRIT

I.

The construction by the Tenth Circuit Court regarding the Rule of *Arnold, Schwinn and Co., supra,* is in conflict with both the clear language ennunciated in *Schwinn* regarding vertical restrictions of territory where title has passed and the factual background which led the U. S. Supreme Court to state that it adopted the District Court's finding of "firm and resolute" insistence on contract provisions.

In the instant case a contract exists which clearly defines territory in which the dealer is authorized to sell. (See Appendix E—the contract in question.) In *Schwinn*

similar contracts *defining* territory had originally existed and thereafter the territory clause had been eliminated from existence. Notwithstanding the said elimination of territory provision the manufacturer *continued to insist* upon territory restrictions on resale of Schwinn products even though title had passed to the dealer. Thus, there was a need to show "firm insistence."

The District Court in *United States* v. *Arnold, Schwinn & Co.*, 237 F.Supp. 323 (1965), pointed out:

> "The Court finds a paragraph that was used in the first Schwinn agreements of 1952 and 1953 but which was stricken from the forms used after January, 1954 and never again used. The paragraph reads substantially as follows:
>
> > 'Dealer will . . . purchase bicycle parts and accessories from an authorized dealer in the area in which the dealer is located.'
>
> The Court finds, however, that in practice this paragraph was continued to be adhered to by the dealers and distributors." 237 F.Supp. at p. 341.

The Supreme Court's discussion of Schwinn recognizes that customers of dealers are affected by illegal contracts when it states that the Schwinn arrangement raises ". . . the fundamental question of the degree to which a manufacturer may . . . allocate territories for resale and *confine access to his product to selected, or franchised, retailers.*" 388 U.S. at p. 378, 87 S.Ct. at p. 1865. (Emphasis added.)

When a contract provision exists designating territory for resale after title has passed, there is no need to show more. This Court said:

"Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by *explicit agreement* (emphasis added) or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act." 388 U.S. at p. 382, 87 S.Ct. 1867.

The Tenth Circuit Rule refuses to recognize that contract provisions authorizing sales in a specified territory (where title has passed) are in themselves "chilling" on the interflow of commerce. This is why this Court said:

"Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. (Citing cases) Such restrictions are so obviously destructive of competition that their mere existence is enough." 388 U.S. at p. 379, 87 S.Ct. at p. 1865.

It makes no sense from a policy standpoint to say that manufacturers *may* incorporate such territory designations in contracts (especially when adhesion types of franchise agreements are viewed) but simply cannot enforce them—or alternatively, that they are legal on paper but illegal if "insisted upon."

It was thus represented to the Tenth Circuit that the policy of the *Schwinn* decision required a holding that the subject contract was illegal as well as the clear language of the *Schwinn* Rule. As Judge Murrah has said, the Tenth Circuit has made "a shambles" of *Schwinn*.

II.

There exists a conflict or authority between three circuits relating to the issue of whether "firm and resolute" insistence must be shown before a contract provision authorizing sales in a specific territory can be determined to be illegal.

The Ninth Circuit Court of Appeals stated in the case of *Beverage Distributors, Inc.* v. *Olympia Brewing Co.*, 440 F.2d 21 (1971) that, ". . . any 'effort' to restrict territory within which the purchaser may resell or persons to whom the product may be transferred is a *per se* violation." 440 F.2d, at p. 30.

The Court in the *Beverage Distributors* case was faced with the problem of actually determining whether "a letter" rose to the dignity of a "contract" determining a territorial restriction or whether "the letter," if not "a contract," was nonetheless "an effort" to impose territorial restrictions. The Court did not determine "the letter" to be "a contract" and found no violation. It is clear, however, that if the Court had determined "the letter" to be "a contract," the Court would have found a violation of the Sherman Act according to the doctrine laid down in *Schwinn*. No reference to "firm and resolute" insistence was raised by the Court as a precondition to establishing a violation when an actual contract was involved.

Contra to the foregoing position is the Second Circuit Court case of *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F.2d 398 (1968), *cert. denied* 393 U.S. 938. In *Janel Sales*, among other more predominant issues, a limitation on customers was argued. In the opinion, without indica-

tion of its reasoning other than citation to the *Schwinn* case, the Court says (almost as an afterthought):

> "In the second place, the existence of such a contractual clause does not necessarily imply a *per se* violation . . . the Supreme Court premised its finding of a *per se* violation on the fact that Schwinn had been 'firm and resolute' in insisting on compliance." 396 F.2d at p. 406.

Also *contra* to *Beverage Distributors* is the instant decision. The Tenth Circuit states:

> "We agree with the Second Circuit that the holding in Schwinn was predicated on the 'firm and resolute' insistence on compliance. (Citing *Janel Sales Corp., supra*).
>
> "Our case is different from Schwinn. We have no explicit contract restriction. Nothing in the contract forbids or even touches on, sales by Thompson outside of the territory." (See Appendix A, pages iv-v.)

Thus the position of the Second and Tenth Circuits is that explicit restrictions (as opposed to designation of territory without further prohibitory language) are required before the *Schwinn* rule applies.

Sound public policy dictates that the confusion in this area should be settled. The importance of the question herein posed, the Petitioner believes, requires that this Court determine that the doctrine of *Schwinn*, applies to contract provisions determining territory as set forth in the subject contract. Such a determination falls within the Rule set forth in *Schwinn* but misstated by the Second and Tenth Circuit Courts.

CONCLUSION

For the reasons set forth herein, the Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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March, 1973

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
JAN 5 1973
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER TERM, 1972

COLORADO PUMP & SUPPLY COMPANY, a Colorado corporation,	)	
Plaintiff-Appellant,	)	
v.	)	No. 72-1204
FEBCO, INCORPORATED, a corporation; GENERAL SPRINKLER CORPORATION, a corporation; BUCKNER INDUSTRIES, INC., a corporation; BUCKNER SPRINKLER CO. DIVISION OF GENERAL SPRINKLER CORPORATION; JAMES R. COSON; and THOMPSON PIPE & STEEL COMPANY, a corporation,	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. C-1436)

[APPENDIX]

James C. Bull (Creamer & Creamer and Quiat & Quiat on the brief) for Plaintiff-Appellant.

M. Dee Biesterfeld (E. L. Fraser and Doyle & Biesterfeld on the brief) for Defendants-Appellees.

Before LEWIS, Chief Judge, and MURRAH and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

In this private antitrust suit the issues are whether actions of defendants-appellees Febco, Incorporated, and Thompson Pipe & Steel Company violate the federal antitrust laws. The district court held for the defendants and dismissed the action. We affirm.

Febco manufactures lawn and turf equipment. Thompson and plaintiff-appellant Colorado Pump & Supply Company are competing wholesale distributors of such equipment in the Colorado area. An important item is the control device for sprinkling systems. Until January 16, 1967, Thompson, Colorado Pump, and other distributors purchased from Febco and received a 50% discount. Colorado Pump had a franchise agreement with Rainbird, a competitor of Febco, and limited its Febco purchases to controllers. The trial court found that other controllers on the market were competitive with, and satisfactory substitutes for, the Febco controllers.

On the mentioned date Thompson and Febco made a written agreement whereby Thompson became the exclusive Febco distributor in a geographically defined area. Thompson received a 50/10% discount on package quantities and 50% on broken package quantities. Other contract provisions will be discussed later. After the agreement, Febco refused to sell directly to Colorado Pump which could, and did, purchase Febco products from Thompson

at a 35% discount on parts and 40% discount on complete line equipment. These were the same discounts given all other distributors and jobbers by Thompson.

With the 35% discount Colorado Pump could not make a profit on sales of controllers and discontinued handling the Febco controller with a resulting loss in business. The complaint alleges that Colorado Pump lost $150,000 in profits; that the actions of Febco and Thompson violated §§ 1, 2, and 14 of Title 15 U.S.C.; and that Colorado Pump is entitled to treble damages. Trial to the court was had on the issue of liability, with damages reserved for later consideration. The court made findings of fact and concluded that Febco and Thompson had not violated the federal antitrust laws.

The contract between Febco and Thompson authorizes Thompson "to sell within the following territory [here follows a description including Colorado and some adjacent area]." Title to the purchased products passes to Thompson at Febco's shipping point. Colorado Pump says that these contract provisions are a per se Sherman Act violation because a manufacturer has imposed vertical restrictions as to territory on a product, title to which has passed from the manufacturer to the distributor.

Prime reliance is placed on United States v. Arnold, Schwinn & Co., 388 U.S. 365, which Colorado Pump says establishes the rule that if the producer passes dominion and title to the distributor, territorial restrictions imposed by the producer are per se violative of the antitrust laws. In Schwinn, the Court commented that the producer had been "firm and resolute" in its insistence upon the limitations and that firmness "was grounded upon the communicated danger of termination." 388 U.S. at 372. We agree with the Second Circuit that the holding in Schwinn was predicated on the "firm and resolute" insistence on compliance. Janel Sales Corp. v. Lanvin Parfums, Inc., 2 Cir., 396 F.2d 398, 406, cert. denied 393 U.S. 938.

[APPENDIX]

Our case is different from Schwinn. We have no explicit contract restriction. Nothing in the contract forbids, or even touches on, sales by Thompson outside of the territory. The trial court found, and we agree, that the contract "contained no resale restrictions with regard to whom Thompson could sell or at what price." Further, no "firm and resolute" action of Febco insisted upon observance of any territorial restriction. The Manager of the Irrigation Division of Thompson testified that although Thompson had not made sales outside of the allocated territory, it was not prohibited from doing so. The Manager of Febco testified that "there was no authorization or no restriction to my knowledge" on Thompson sales outside of the territory. Our situation is a far cry from that considered in Schwinn.

The contract provision with which we are concerned is no more than a description of a primary marketing territory and as such is not a per se violation. Plastic Packaging Materials, Inc. v. Dow Chemical Co., E.D.Pa., 327 F.Supp. 213, 225; see also Janel Sales Corp. v. Lanvin Parfums, Inc., 2 Cir., 396 F.2d 398, 406, cert. denied 393 U.S. 398. Contrary to Colorado Pump's assertion, Interphoto Corp. v. Minolta Corp., S.D.N.Y., 395 F.Supp. 711, aff'd 2 Cir., 417 F.2d 621, did not hold that a per se violation could be found on the basis of a mere contractual provision. In that case, the court found that Minolta had persistently advised its distributor against unwanted incursions into restricted areas. 295 F.Supp. at 720. The record before us is devoid of any suggestion that Febco had even admonished Thompson to confine its sales to the described territory.

In our opinion the attacked contract provision is not a per se Sherman Act violation. When coupled with the other evidence in the record, it shows no violation. A manufacturer may select the customers to whom he will sell so long as his conduct has no monopolistic or market control purpose. New Home Appliance Center v. Thompson, 10 Cir., 250 F.2d 881, 884. Here we have no price fixing and no evi-

dence of market control. The trial court found that the marketing of lawn and turf equipment "is highly competitive on a national and regional basis." We have nothing more than a vertical confinement of sales to a selected customer of a product which is competitively available from others. This is not enough to establish a Sherman Act violation. Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 9 Cir., 416 F.2d 71, 76, cert. denied 396 U.S. 1062, and cases there cited.

Under the contract, Thompson was obligated to "maintain adequate inventories of products and parts which will enable Distributor to offer for sale a complete line of said products and service them after installation." Colorado Pump argues that this is an impermissible tying arrangement in that the requirement that the complete line be stocked is tied to the right to acquire the desirable Febco controller. A tying arrangement is an agreement by a party to sell a product but only on the condition that the buyer also purchases a different (or tied) product or at least agrees that he will not purchase that product from any other supplier. Northern Pac. R. Co. v. United States, 356 U.S. 1, 5-6.

A tying arrangement is a per se Sherman Act violation if (1) the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and (2) a "not insubstantial" amount of commerce is foreclosed to competitors. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 499-500, quoting Northern Pac. R. Co. v. United States, 356 U.S. 1, 5-6.

The claim of adverse economic impact rests upon the desirability of the Febco controller. Although there was evidence that Colorado Pump considered the Febco controller to be superior, there was none that Thompson, the supposed victim of the tying arrangement, was of the same opinion. Competent evidence of the availability and suita-

bility of alternative products was relevant. Elder-Beerman Stores Corp. v. Federated Department Stores, Inc., 6 Cir., 459 F.2d 138, 144. The trial court found on conflicting evidence that: "Other controllers on the market were competitive with and satisfactory substitutes for the Febco controllers." This negates any inference of sufficient economic power to restrain free competition. It should be noted in passing that here we have no conditioning of the right to purchase controllers on the purchase of worthless products, no evidence of the imposition of burdensome terms by Febco, no restriction on the right of Thompson to distribute products in competition with those of Febco, no evidence that the prices of the balance of the Febco line were inflated, and no evidence that Febco used any coercion on Thompson.

The other requirement for a per se violation by a tying agreement is the foreclosure of a substantial amount of commerce to competitors. It is conceivable that the need to maintain adequate inventories might affect commerce by providing impetus to sell products of the manufacturer rather than those of another. Be that as it may, there is no evidence of the cost of maintaining the necessary inventory or of its effect on Thompson sales. The trial court held that in the competitive industry Thompson is free to sell products of Febco's competitors. The mere existence of the requirement that the full line be stocked, without additional information about its competitive impact, does not suffice to establish an unreasonable restraint of trade. Cf. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 325-329. We are convinced that the record shows no impermissible tying arrangement.

Colorado Pump argues that a Sherman Act violation, monopolization of the Colorado market, was accomplished through the use of a price discrimination scheme prohibited by the Robinson-Patman Act, 15 U.S.C. § 13. Perhaps it is enough to say that we find nothing in the record to sustain

the claim of monopolization. We also find no Robinson-Patman violation. That Act prohibits price discrimination "between different purchasers" and does not prevent persons selling goods in commerce "from selecting their own customers in bona fide transactions and not in restraint of trade." After its agreement with Thompson, Febco stopped selling to Colorado Pump. The record shows only a refusal to deal, not price discrimination. Colorado Pump had to buy Febco products from Thompson at a greater price than Thompson had to pay but at the same price charged to other purchasers from Thompson. Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc., 5 Cir., 383 F.2d 97, cert. denied 390 U.S. 904, is not in point. The court there recognized the holding in Schwinn that vertical refusals to deal are immunized so long as there are competitive products readily available to others, 388 U.S. at 376, and held that a jury question was presented on the issue of whether competitive products were available, 383 F.2d at 105. In the instant case, the trier of the fact found that competitive products were available.

Colorado Pump argues that the Febco-Thompson contract contains an impermissible customer restriction. The contract says that "in no event shall Distributor's retail sales exceed one-third (1/3) of Distributor's annual sales volume." As we read the record, this argument was not part of the legal theory upon which the case was tried. Cf. Stephens Industries, Inc. v. Haskins & Sells, 10 Cir., 438 F.2d 357, 361. If it was, no evidence was adduced as to the total sales, the sales to distributors, the sales to retailers, or of any efforts by Febco to enforce the provision. Nothing shows that the restriction was unreasonable or that any purchaser, wholesale or retail, did or could suffer in the highly competitive industry with adequate substitutes readily available. We find nothing in Schwinn or any other authority holding that the attacked provision is a per se Sherman Act violation.

Finally, Colorado Pump attacks the findings of the trial court on the ground of inadequacy. In our opinion the findings are adequate, sustained by substantial evidence, and not clearly erroneous.

Affirmed.

No. 72-1204

MURRAH, Circuit Judge, dissenting in part:

I dissent only from so much of the opinion of the court which holds that the Febco-Thompson Pipe & Steel Company contract did not violate § 1 of the Sherman Act, which condemns "[e]very contract . . . in restraint of trade. . . ." The statutory language has been tampered by the rule of reason in some vertical relationships. *See* United States v. Topco Associates, 405 U.S. 596 (1972).

But *Schwinn* decrees that vertical territorial restrictions after title has passed are *per se* violations of the Act. In my view, we have just such a contract here. The majority seem to make the case turn on the vagueness of the restrictions on sales outside the authorized territory. They say that it authorizes Thompson to sell within a given territory but does not expressly forbid sales outside that territory. But there have been no sales outside the explicitly allocated territory, and we are left to speculate on what would happen if such extraterritorial sales, were in fact, made. I do not believe that the legality of a contract such as this one should be made to turn on whether the contractual restrictions are "firmly and resolutely" enforced. Otherwise, *Schwinn* is a shambles.

APPENDIX B

FILED
United States District Court
Denver, Colorado
DEC 6 1971
G. WALTER BOWMAN
Clerk

By _____
Dep. Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-1436

COLORADO PUMP & SUPPLY COMPANY, a Colorado corporation, Plaintiff, vs. FEBCO, INCORPORATED, a corporation; GENERAL SPRINKLER CORPORATION, a corporation; BUCKNER INDUSTRIES, INC., a corporation; BUCKNER SPRINKLER CO. DIVISION OF GENERAL SPRINKLER CORPORATION; JAMES R. COSON; and THOMPSON PIPE & STEEL COMPANY, a corporation, Defendants.	CONCLUSIONS OF LAW FINDINGS OF FACT AND ORDER

Mr. George Louis Creamer, Attorney at Law, 928 Equitable Building, Denver, Colorado 80202, for Plaintiff;

Mr. E. L. Fraser, and Messrs. Doyle & Biesterfield, Attorneys at Law, First National Bank Building, Denver, Colorado 80202, for Defendants. CHILSON, Judge

This action was tried to the Court on October 7 and 8, 1971. The Court heard the evidence with regard to the liability of the defendants. The matter was then continued for the filing of briefs. The Court has considered the evidence and the briefs and is now prepared to render its decision.

This is an action for treble damages and injunctive relief under the antitrust laws. 15 U.S.C. §§1, 2, and 14.

The motion of the defendants, James R. Coson, Buckner Industries, Inc., a corporation and Buckner Sprinkler Co., a division of General Sprinkler Corporation to quash the return of service of summons on said defendants was granted December 9, 1969.

FINDINGS OF FACT

The Court makes the following findings of fact.

Defendant, Febco, Incorporated (Febco) is a manufacturer of lawn and turf equipment. Defendant Thompson Pipe and Steel Company (Thompson) is a wholesale distributor of such equipment. Plaintiff Colorado Pump and Supply Company (Colorado Pump) is also a wholesale distributor of such equipment and a competitor of Thompson.

The market for lawn and turf equipment is highly competitive on a national and regional basis. Patent control is an insignificant factor for these products.

Until January 16, 1967, Thompson, Colorado Pump, and other wholesalers purchased equipment at a 50% discount from Febco or its manufacturer's representative on an order to order basis. Colorado Pump limited its purchases from Febco to Febco controllers and purchased other lawn and turf equipment from other manufacturers.

Febco decided to change its distribution policies in the Colorado area. In November, 1966, Febco contacted Thompson with regard to becoming the exclusive distributor of Febco. Febco desired a distributor that would stock a complete line of lawn and turf equipment, provide engineering services to the installers and users of Febco products, and would service Febco products. Colorado Pump learned of Febco's intention to change its distribution policy prior to January 12, 1967.

On January 16, 1967, a contract was entered into between Febco and Thompson which made Thompson the exclusive distributor of Febco products in a geographically defined territory in the Colorado area. By the terms of the franchise agreement, Thompson was to receive a 50/10% discount on standard package quantities and a 50% discount on broken package quantities. The agreement contained no resale restrictions with regard to whom Thompson could sell or what price it could sell. Also Thompson was free to distribute products in competition with Febco products.

Prior to entering into the above agreement with Thompson, Febco filled a large order for Febco controllers placed by Colorado Pump. An inventory of these controllers lasted Colorado Pump until August 1968. Other controllers on the market were competitive with and satisfactory substitutes for the Febco controllers. In addition after January 16, 1967, Colorado Pump purchased Febco parts from Thompson at a 35% discount and Febco complete equipment at a 40% discount.

It should be noted that Colorado Pump was the exclusive distributor of Rainbird equipment under a franchise agreement with Rainbird. By the terms of this agreement, Colorado Pump was to handle only Rainbird products. Rainbird is a competitor of Febco.

CONCLUSIONS OF LAW

The Court concludes as a matter of law that the defendants or any of them did not violate the anti trust laws of the United States as alleged in plaintiff's first statement of claim and that plaintiff has not sustained the burden of proving the allegations upon which it bases its second statement of claim, and that judgment should be entered in favor of the defendants and against the plaintiff, dismissing the complaint and for defendants' costs.

IT IS THEREFORE ORDERED that judgment of dismissal of the complaint enter forthwith and that judgment enter for defendants' cost to be taxed by the Clerk of the Court upon the filing of a bill of costs.

Entered this 6th day of December, 1971.

BY THE COURT:

s/ Hatfield Chilson

United States District Judge

Stamped

Entered
On the Docket
Dec. 9 - 1971
G. Walter Bowman
By D. H.
Dep. Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
United States District Court
Denver, Colorado
DEC 8 1971
G. WALTER BOWMAN
Clerk

By _____
Dep. Clerk

COLORADO PUMP & SUPPLY COMPANY, a Colorado corporation,	]	Civil Action No. C-1436
Plaintiff,	]	
vs.	]	
FEBCO, INCORPORATED, a corporation; GENERAL SPRINKLER CORPORATION, a corporation; BUCKNER INDUSTRIES, INC., a corporation; BUCKNER SPRINKLER CO. DIVISION OF GENERAL SPRINKLER CORPORATION; JAMES R. COSON; and THOMPSON PIPE & STEEL COMPANY, a corporation,	]	JUDGMENT OF DISMISSAL
Defendants.	]	

PURSUANT TO and in accordance with the Order heretofore entered; it is

ORDERED that this action and the complaint herein are hereby dismissed; and it is further

ORDERED that the defendants, above-named, have and recover of the plaintiff, above-named, judgment for their costs to be taxed upon the filing of a Bill of Costs.

DATED at Denver, Colorado, this 7th day of December, 1971.

BY THE COURT:

s/ Hatfield Chilson

HATFIELD CHILSON
U. S. District Judge.

Stamped

Entered
On the Docket
Dec. 9 - 1971
G. Walter Bowman
By D. H.
Dep. Clerk

APPENDIX C

JANUARY TERM—FEBRUARY 7, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable Alfred P. Murrah and Honorable Jean S. Breitenstein, Senior Circuit Judges

COLORADO PUMP & SUPPLY COMPANY, a Colorado corporation,	)	
Plaintiff-Appellant,	)	
v.	)	No. 72-1204
FEBCO, INCORPORATED, a corporation; GENERAL SPRINKLER CORPORATION, a corporation; BUCKNER INDUSTRIES, INC., a corporation; BUCKNER SPRINKLER CO. DIVISION OF GENERAL SPRINKLER CORPORATION; JAMES R. COSON; and THOMPSON PIPE & STEEL COMPANY, a corporation,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of the petition for rehearing filed by the appellant.

Upon consideration whereof, Chief Judge Lewis and Judge Breitenstein vote to deny the petition for rehearing. Judge Murrah votes to grant the petition for rehearing.

It is the order of the Court that the petition for rehearing be and the same is hereby denied.

s/ Howard K. Phillips
HOWARD K. PHILLIPS,
Clerk

APPENDIX D

15 U.S.C. Sec. 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment of maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. Sec. 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. Sec. 15

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

APPENDIX E

Distributor Franchise Agreement
Between
Thompson Pipe & Steel Company
and
Febco Incorporated

FEBCO DISTRIBUTOR FRANCHISE AGREEMENT

THIS AGREEMENT is made this 16th day of January, 1967, between FEBCO INC., a California corporation, having its principal place of business at 9121 Glenoaks Boulevard, Sun Valley, California, hereinafter referred to as "Febco," and Thompson Pipe & Steel Company of Denver, Colorado hereinafter referred to as "Distributor."

WITNESSETH:

FEBCO AND DISTRIBUTOR DO *MUTALLY* AGREE AS FOLLOWS:

1. *APPOINTMENT:* Febco hereby appoints Distributor as one of its franchised distributors of Lawn and Turf Irrigation Equipment as set forth in the price list attached hereto marked Exhibit "A" (hereinafter referred to as said "products").

2. *TERRITORY:* This authorizes Distributor to sell within the following territory: Colorado, Wyoming, New Mexico, Western Nebraska from County lines running North and South lying East of U.S. Hwy. 83 and Western Kansas from County lines running North and South lying East of U.S. Hwy. 283.

3. *TERM:* This agreement shall commence on the date hereof and shall terminate on December 31st of this calendar year.

4. *DISTRIBUTOR'S DUTIES:* Distributor hereby accepts such appointment and agrees to establish a distributorship organization to service jobbers, dealers, contractors and installers in Distributor's territory in the following manner:

(a) Distributor will vigorously promote the sale and installation of Febco products in Distributor's territory.

(b) Distributor will maintain adequate inventories of products and parts which will enable Distributor to offer for sale a complete line of said products and service them after installation.

(c) Distributor will operate as a wholesale outlet and will sell to jobbers, dealers, contractors and installers, except in such cases where the latter are not available on a particular sale, but in no event shall Distributor's

retail sales exceed one-third (1/3) of Distributor's annual sales volume.

(d) Distributor will at its expense service products sold by Distributor and installed in Distributor's territory, but in the event service is required because of a breach of warranty on products sold by Febco to Distributor, then Febco shall be liable to Distributor for the service expense to the extent of Febco's product warranty hereinafter set forth.

Distributor shall service all Febco products which have been installed in Distributor's territory prior to Distributor's appointment, upon such terms and conditions as the Distributor and Febco shall agree in writing.

5. *SUPPLY OF PRODUCTS:* Febco shall sell and deliver to the Distributor any and all products which are covered by this agreement. Febco shall not be liable for failure to deliver any product which has been discontinued or is temporarily out of stock or is unavailable for any other reason, and may change the prices of any product without notice.

6. *TERMS OF SALE:* Febco shall sell and Distributor shall purchase said products on the following terms and conditions:

Prices:	Prices shall be effective November 1, 1966 and are subject to change without notice.
Acceptance:	All orders subject to acceptance at Febco's home office.
F.O.B. Point & Freight:	All sales are made F.O.B. factory, Sun Valley, California. Truck freight allowances on any single order amounting to $300.00 net cost or more on single shipment to

one destination in Continental United States or Canada. Carriers used will be at discretion of Febco. Specified carriers will be used on a freight collect basis.

Title and Risk of Loss: Title shall pass to purchaser F.O.B. Sun Valley, California and thereafter risk of loss, injury or destruction of the products described herein shall be borne by the purchaser and such loss, injury or destruction shall not release the purchaser from paying the purchase price therefor.

Terms: Net 30 days—no discount. Interest at 3/4 of 1% per month will be charged on all debts past 30 days. Minimum order $5.00 net billing except on repairs.

Cancellation of Orders: Cancellation request must be received at factory before the order is shipped. Items of special manufacture and large orders beyond normal purchase are not cancellable without written authorization from factory.

Liability: Factory is not responsible for delays and losses beyond its control.

Returned Merchandise: No merchandise may be returned without Febco's prior written authorization. Returned merchandise must be shipped prepaid to Febco factory, Sun Valley, California, in like new condition, and will be subject to factory inspection, plus 15%

handling charge or $3.50 minimum charge. All specially built equipment is subject to a minimum handling charge of 25% and factory inspection.

Guarantee: All Febco products are guaranteed against defective material and workmanship for one year from date of invoice. Liability under the foregoing guarantee is limited to the replacement of Febco products, excluding cost of removal, installation or unauthorized repairs. The company shall not be liable for any consequential damage.

7. *DISTRIBUTOR'S DISCOUNTS:* 50/10% on standard package quantities only—50% on broken package quantities.

8. *COOPERATIVE ADVERTISING PROGRAM:* Distributor will advertise Febco products throughout Distributor's territory and Febco will match Distributor's advertising cost dollar for dollar to the extent of one per cent (1%) of Distributor's net purchases in each current calendar year. Advertising credits will be issued at the end of each calendar year and will include the direct cost only of space or materials used in the following forms of advertising:

Magazines	Directories (not telephone)	Billboards
Newspapers	Radio	Fairs
Trade Journals	T. V.	Local Trade Shows
Displays	Signs	Promotional Stories (Must use FEBCO trade name)

In the event Distributor advertises other non-competitive products in the same advertisement, Febco will determine the proportion of advertising devoted to the promotion of Febco products and allow a credit accordingly. Distributor will submit proof of advertising and copies of paid invoices on or before the end of the calendar year, and upon approval by Febco, Distributor's account will be credited on January 15th of the following year to the extent of one per cent (1%) of Distributor's net purchases as above stated.

9. *TELEPHONE DIRECTORY ADVERTISING:* Febco will invoice Distributor for one-half the cost of advertising in Distributor's local telephone directories under Febco Trade Mark (T.M.). The telephone directory advertising program has no connection with our cooperative advertising program as outlined in this agreement.

10. *INDEPENDENT CONTRACTOR:* Distributor is an independent contractor and shall have no authority to commit Febco in any manner, cause or thing. The relationship between the parties is that of purchaser and seller. Distributor shall be fully responsible for all costs of maintaining and carrying on its business and may employ such personnel at such compensation and on such conditions as may be necessary to effectively sell, install, and service Febco's products. Any agreement between Distributor and its personnel shall contain a provision that said personnel are the employees of Distributor and not of Febco.

11. *ASSIGNMENT:* Distributor may not assign any of its right, title or interest in this agreement, voluntarily or involuntarily, whether under operation of law, or otherwise, without first obtaining the prior written consent of Febco.

12. *BANKRUPTCY:* If Distributor is voluntarily or involuntarily declared a bankrupt, or commits an act of bankruptcy, or makes an assignment for benefit of credi-

tors, Febco may at its option immediately terminate this agreement.

13. *NOTICES:* Any demand or notice which either party shall be required or may desire to make upon or give to the other shall be in writing; such demand, or notice may be delivered personally or sent by registered or certified mail addressed to the respective parties as follows:

To: FEBCO INC.
9121 Glenoaks Boulevard
Post Office Box 368
Sun Valley, California 91352

To: Thompson Pipe & Steel Co.
3001 Larimer Street
P. O. Box 2852
Denver, Colorado 80201

14. *SEPARATENESS OF PROVISIONS:* In the event any part of this agreement between Febco and Distributor shall be found to be illegal or a violation of public policy or for any other reason unenforceable in law, such finding shall in no event invalidate the other parts of this agreement.

15. *ATTORNEYS FEES:* In the event either Distributor or Febco shall be required to commence legal action to enforce the terms of this agreement, the party prevailing in such action shall be entitled to costs of suit and reasonable attorneys fees as determined by the court.

16. *ENTIRE AGREEMENT:* This agreement encompasses all of the terms and conditions and representations made by either party and supersedes any other arrangement discussed by the parties.

17. *APPLICABLE LAW:* This agreement shall be interpreted and construed in accordance with the laws of the State of California.

IN WITNESS WHEREOF, Febco and Distributor have executed this agreement on the date stated above.

FEBCO INC., A California Corporation

/s/ (illegible)

Signature

Vice President (Title)

Submitted By:

Thompson Pipe & Steel Company

Distributor (Print name of Company)

/s/ S. Mark Davidson

Signature

S. MARK DAVIDSON, PRESIDENT (Title)

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari were served upon

Doyle & Biesterfeld and E. L. Frazer,
1255 First National Bank Building
Denver, Colorado 80202

All parties served by mailing such true and correct copies, postage fully prepaid, this _____ day of March, 1973.

James C. Bull